



November 30, 2017

BY ELECTRONIC MAIL

Dele Awoniyi
FOIA Officer
U.S. Office of Surface Mining Reclamation and Enforcement
1951 Constitution Ave., NW
Washington, D.C. 20240
foia@osmre.gov

Re: Freedom of Information Act Request and Request for Fee Waiver

Dear Mr. Awoniyi:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Interior Department regulations promulgated at 43 C.F.R. § 2, WildEarth Guardians hereby requests the following records from the U.S. Office of Surface Mining Reclamation and Enforcement (“OSMRE”):

1. Any and all records documenting, discussing, and/or describing in any way OSMRE’s actions to initiate a rulemaking to amend the agency’s environmental protection regulations at 30 C.F.R. §§ 816 and 817 to address issues related to coal mine blasting emissions in response to the April 18, 2014 rulemaking petition filed by WildEarth Guardians, which was granted by OSMRE on February 3, 2015. *See* 80 Fed. Reg. 9256 (Feb. 20, 2015).
2. Any and all records related to the decision to put on hold OSMRE actions to initiate a rulemaking to amend the agency’s environmental protection regulations at 30 C.F.R. §§ 816 and 817, as recently documented by the U.S. Office of Information and Regulatory Affairs on the agency’s Reginfo.gov website. *See* Exhibit 1.

For purposes of this request, records include, but are not limited to, communication records (including, but not limited to, recorded voicemails, text messages, chat messages, e-mails, and printed letters), memoranda, facsimiles, reports, analyses, meeting notes, records of conversations, meeting sign-in sheets, images, video, and audio. We request all responsive records on file with OSMRE, including its Regional Offices, including both records created and obtained by the agency, regardless of the means by which they were obtained, whether draft or final. We would prefer to receive all responsive records in a digital format that is readable and searchable using computer software commonly available to the public.

For purposes of this request, we do not request any records that are already publicly available online on an OSMRE website that is not subject to alteration or elimination, whether temporarily or permanently. Below we detail our request for a fee waiver.

Request for Fee Waiver

WildEarth Guardians requests that you waive all fees in connection with this matter if this request is treated as a FOIA request. As shown below, we meet the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii):

- I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.**

In considering whether WildEarth Guardians meets this fee waiver criteria, it is imperative that the OSMRE remember FOIA, in general, carries a presumption of disclosure and that the fee waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as WildEarth Guardians access to government documents without the payment of fees. As stated by one Senator, “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the 9th Circuit has stated:

The amended statute ‘is to be liberally construed in favor of waivers for noncommercial requesters.’ (citing Sen. Leahy). The amendment’s main purpose was ‘to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.’ (citing Sen. Leahy).

McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987). Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by watchdog organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the D.C. Circuit Court has stated:

This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups.

Better Gov’t Ass’n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

- A. The subject of the request concerns “the operations and activities of the government.”**

As this is a request for documents from an executive branch agency, OSMRE, it is clear

that this request concerns the operations and activities of government. The information is directly related to the agency's actions to initiate a rulemaking to amend its environmental protection regulations at 30 C.F.R. §§ 816 and 817.

B. The disclosure is “likely to contribute” to a public understanding of government operations or activities (the informative value of the information to be disclosed and ability to disseminate).

The information requested will provide insight into the progress OSMRE is or is not making to amend the agency's regulations at 30 C.F.R. §§ 816 and 817. In 2015, the agency acknowledged a need to amend and/or revise regulations at 30 C.F.R. §§ 816 and 817 to address concerns over whether current regulations regarding blasting emissions at coal mines meet statutory requirements under the Surface Mining Control and Reclamation Act (“SMCRA”). The requested information will provide insight into the progress OSMRE has made in initiating a rulemaking and following through with the agency's duty to promulgate a rule after granting a rulemaking petition.

WildEarth Guardians has specifically and consistently demonstrated its ability to disseminate information relative to the policies and management practices of OSMRE. We accomplish this information dissemination through printed media (both paid media and earned media), our email list, list-serves to which we post, printed publications we write and distribute via mail and the internet, articles and essays for other public interest organizations, and public meetings held or sponsored by us, other nonprofit public interest entities, or federal agencies. OSMRE has consistently granted fee waivers for Guardians, acknowledging our ability to effectively disseminate information received under FOIA.

Other U.S. Interior Department agencies including the Office of the Secretary, U.S. Bureau of Land Management, U.S. Fish and Wildlife Service, and U.S. Bureau of Reclamation consistently grant our requests for fee waivers. Other federal agencies, including the U.S. Environmental Protection Agency, U.S. Department of Agriculture, and U.S. Forest Service also consistently grant our requests for fee waivers.

WildEarth Guardians is a non-profit organization that informs, educates, and empowers the public regarding environmental issues, policies, and laws. We have been involved in OSMRE management and oversight of coal mining for many years. WildEarth Guardians submitted the petition that prompted OSMRE to determine that changes to 30 C.F.R. §§ 816 and 817 were warranted.

Our organization plays an active role in informing the American public about OSMRE regulation and oversight of the mining of coal, particularly in the western United States. We have been regularly interviewed and quoted by the news media with regards to OSMRE regulation of surface coal mining, particularly in relation to environmental protection requirements. We have been specifically interviewed and quoted by the news media in relation to our efforts to call attention to issues related to adequate regulation of blasting emissions at surface coal mining operations in the United States.

We have consistently displayed our ability to disseminate information granted to us through FOIA fee waivers. Recent newspaper and other media articles have featured WildEarth Guardians and the information it has gathered under FOIA, particularly in relation to issues related to OSMRE regulation of surface coal mining.

In granting a fee waiver to WildEarth Guardians, it is important to recognize that (1) our requested information will contribute significantly to the public understanding of the operations or activities of the government, (2) our requested information will enhance the public's understanding to a greater degree than currently exists, (3) WildEarth Guardians possesses the expertise to explain the requested information to the public, (4) WildEarth Guardians possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that WildEarth Guardians is an established expert in the field of OSMRE actions related to the agency's regulations at 30 C.F.R. §§ 816 and 817.

WildEarth Guardians staff and contractors responsible for interpreting, compiling and presenting this information to the public in an understandable manner possess the requisite experience, intelligence and expertise to carry out this task. WildEarth Guardians has consistently proven its ability to disseminate information obtained from OSMRE.

C. The disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

Public oversight and enhanced understanding of the OSMRE's efforts to amend and/or revise regulations at 30 C.F.R. §§ 816 and 817 is necessary to understand whether and when the agency will follow through to update its rules to ensure consistency with SMCRA. The agency has already granted a rulemaking petition filed by WildEarth Guardians. The requested information will contribute significantly to the public's understanding of the agency's progress in following through with promulgating a rule and/or rules.

WildEarth Guardians' track record of active participation in oversight of issues related to OSMRE regulation and oversight of surface coal mining, and our contribution to the public's understanding of these issues compared to the level of public understanding prior to disclosure are well established.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is:

“whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.”

Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994) (emphasis added).

The information requested in this FOIA request will be used to contribute to one or more of the following: petitions, local and national newsletters, public presentations, e-mail and postal mail publications, and local and national news stories contributed to or written by WildEarth Guardians and its members. The most likely sources of dissemination will be through the print

media, although it may also be disseminated through other public advocacy channels and associated media work and mailed publications.

WildEarth Guardians will also disseminate the requested information via a publicly accessible “repository” website where Guardians’ Climate and Energy Program posts FOIA requests and responses from federal agencies. This website is available here, <https://climatewest.org/wildearth-guardians-climate-and-energy-program-foia-repository/>. Not only will we post responsive records online here, but we will also alert the public to the availability of responsive information via the blog site, <http://ClimateWest.org>.

1. The use of these records will add new and different information to the public understanding.

The information requested has not yet been fully analyzed, summarized, and disseminated by any member of the public, thus its use will add new and different information to public understanding.

2. Whether all or a portion of the broadscale records will be used to enlighten the public.

We do not consider this request to be broadscale, but a specific and focused request for records related to OSMRE’s actions to amend and/or revise regulations at 30 C.F.R. §§ 816 and 817 after granting a rulemaking petition filed by WildEarth Guardians. All the documents will be used, because all are necessary for gaining a true understanding of the issues. The specific records will shed more complete light on OSMRE’s actions and progress.

3. Whether any of the records consist of generic information that lacks substantial informative value.

It is our belief that there is no ‘generic’ information on this topic, due to the public’s limited perception of this subject.

4. Whether any of the requested information has already been publicly available either in a duplicative or a substantially identical form, or is readily available from another source.

To the best of our knowledge, very few to none of the documents requested in this FOIA have been released to the public. As we indicated earlier in this request, we do not request any responsive documents that are currently available online on an OSMRE website that is not subject to alteration or elimination, whether temporarily or permanently. If portions of the requested information have been released to the public and are readily available and accessible from another source, we request OSMRE please inform us of this situation.

II. Obtaining the information is of no commercial interest.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to WildEarth Guardians' role of educating the general public. WildEarth Guardians, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

Should you decide not to waive fees, we request that you contact us prior to incurring any costs in excess of \$25. Please feel free to request additional information concerning our fee waiver request if you believe it is needed to make a final decision.

If you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

1) Why is each document predecisional?

- a. To what decision are each of the documents leading toward?
- b. Has this decision been finalized?

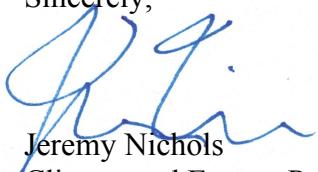
2) Why is each document deliberative?

- a. To what extent does each make a recommendation on a legal or policy matter?

3) What policy recommendation qualifies this document for exemption?

We look forward to your reply within twenty working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions, concerns, or would like to discuss this FOIA request in more detail, please contact me at the information below. Thank you.

Sincerely,



Jeremy Nichols

Climate and Energy Program Director
WildEarth Guardians
2590 Walnut St.
Denver, CO 80205
(303) 437-7663
jnichols@wildearthguardians.org

RIN Data

DOI/OSMRE**RIN:** 1029-AC71**Publication ID:** Update 2017**Title:** Toxic Gases and Blasting**Abstract:**

This rule would require surface coal mining operators to prevent injury to people and damage to property from any harm that could result from toxic gases generated by blasting at coal mines, including nitrogen oxide (NOx) and carbon monoxide (CO), and would define "blast area" to ensure areas affected by blasting are properly secured and that the public is adequately protected. This agenda item is being withdrawn at the present time to allow the Department to assess the action further and determine whether rulemaking is appropriate. Following such an assessment, the Department may determine that certain rules listed as withdrawn under this agenda are appropriate for promulgation. If that determination is made, such rules will be included in a succeeding semiannual agenda under a new RIN.

Agency: Department of the Interior(DOI)**RIN Status:** Previously published in the Unified Agenda**Major:** No**CFR Citation:** [30 CFR 816](#) [30 CFR 817](#)**Legal Authority:** [5 U.S.C. 553\(e\)](#) [30 U.S.C. 1211\(c\)\(2\)](#)**Legal Deadline:** None**Timetable:**

Action	Date	FR Cite
Withdrawn	03/27/2017	

Regulatory Flexibility Analysis Required: No**Small Entities Affected:** No**Included in the Regulatory Plan:** No**RIN Data Printed in the FR:** No**Agency Contact:**

Joshua Rockwell
 Mining Engineer
 Department of the Interior
 Office of Surface Mining Reclamation and Enforcement
 1951 Constitution Avenue NW.,
 Washington, DC 20240
 Phone: 202 208-2633
 Email: jrockwell@osmre.gov

Priority: Substantive, Nonsignificant**Agenda Stage of Rulemaking:** Completed Actions**Unfunded Mandates:** No**Government Levels Affected:** None**Federalism:** No